

1 EDMUND G. BROWN JR.
Attorney General of California
2 LINDA K. SCHNEIDER
Supervising Deputy Attorney General
3 G. MICHAEL GERMAN
Deputy Attorney General
4 State Bar No. 103312
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-2617
7 Facsimile: (619) 645-2061
Attorneys for Complainant

8
9 **BEFORE THE**
BOARD OF REGISTERED NURSING
DEPARTMENT OF CONSUMER AFFAIRS
10 **STATE OF CALIFORNIA**
11

12 In the Matter of the Accusation Against:

Case No.

2009-314

13 **FRANK J. DELUCA, RN**
14 **4241 Hamilton Street**
San Diego, CA 92104

A C C U S A T I O N

15 **Registered Nurse License No. 588539**

16 Respondent.
17

18 Complainant alleges:

19 **PARTIES**

20 1. Ruth Ann Terry, M.P.H., R.N. (Complainant) brings this Accusation solely in her
21 official capacity as the Executive Officer of the Board of Registered Nursing, Department of
22 Consumer Affairs.

23 2. On or about October 5, 2001, the Board of Registered Nursing issued Registered
24 Nurse License Number 588539 to Frank J. Deluca (Respondent). The Registered Nurse License
25 was in full force and effect at all times relevant to the charges brought herein and will expire on
26 June 30, 2009, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board of Registered Nursing (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 118 of the Code provides, in pertinent part, that the expiration of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary proceeding against the licensee or to render a decision imposing discipline on the license.

5. Section 2750 of the Code provides, in pertinent part, that every licensee or licensee holding licenses placed in an inactive status, may be disciplined as provided in this article.

6. Section 2764 of the Code states:

The lapsing or suspension of a license by operation of law or by order or decision of the board or a court of law, or the voluntary surrender of a license by a licensee shall not deprive the board of jurisdiction to proceed with any investigation of or action or disciplinary proceeding against such license, or to render a decision suspending or revoking such license.

STATUTORY PROVISIONS

7. Section 490 of the Code states:

(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

(b) Notwithstanding any other provision of law, a board may exercise any authority to discipline a licensee for conviction of a crime that is independent of the authority granted under subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the licensee's license was issued.

(c) A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action that a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

(d) The Legislature hereby finds and declares that the application of this section has been made unclear by the holding in *Petropoulos v. Department of Real Estate* (2006) 142 Cal.App.4th 554, and that the holding in that case has placed a significant number of statutes and regulations in question, resulting in potential harm to the consumers of California from licensees who have been convicted of crimes. Therefore, the Legislature finds and declares that this section establishes an

1 independent basis for a board to impose discipline upon a licensee, and that the
2 amendments to this section made by Senate Bill 797 of the 2007-08 Regular Session
do not constitute a change to, but rather are declaratory of, existing law.

3 8. Section 493 of the Code states, in pertinent part:

4 Notwithstanding any other provision of law, in a proceeding conducted by a
5 board within the department pursuant to law to deny an application for a license or to
6 suspend or revoke a license or otherwise take disciplinary action against a person who
7 holds a license, upon the ground that the applicant or the licensee has been convicted
8 of a crime substantially related to the qualifications, functions, and duties of the
9 licensee in question, the record of conviction of the crime shall be conclusive
evidence of the fact that the conviction occurred, but only of that fact, and the board
may inquire into the circumstances surrounding the commission of the crime in order
to fix the degree of discipline or to determine if the conviction is substantially related
to the qualifications, functions, and duties of the licensee in question.

10 9. Section 2761 of the Code states, in pertinent part:

11 The board may take disciplinary action against a certified or licensed nurse or
deny an application for a certificate or license for any of the following:

12 (a) Unprofessional conduct, which includes, but is not limited to, the following:

13 . . .

14 (f) Conviction of a felony or of any offense substantially related to the
15 qualifications, functions, and duties of a registered nurse, in which event the record of
the conviction shall be conclusive evidence thereof.

16 10. Penal Code section 290 provides in pertinent part that every person who is convicted
17 of a sexual crime shall be required to register as a sex offender.

18 11. Penal Code section 311.4 states, in pertinent part:

19 . . .

20 (d)(1) As used in subdivisions (b) and (c), "sexual conduct" means any of the
21 following, whether actual or simulated: sexual intercourse, oral copulation, and
intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual
22 masochism, penetration of the vagina or rectum by any object in a lewd or lascivious
manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual
23 stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288,
or excretory functions performed in a lewd or lascivious manner, whether or not any
24 of the above conduct is performed alone or between members of the same or opposite
sex or between humans and animals. An act is simulated when it gives the
25 appearance of being sexual conduct.

26 (2) As used in subdivisions (b) and (c), "matter" means any film, filmstrip,
photograph, negative, slide, photocopy, videotape, video laser disc, computer
27 hardware, computer software, computer floppy disc, or any other computer-related
equipment or computer-generated image that contains or incorporates in any manner,
28 any film, filmstrip, photograph, negative, slide, photocopy, videotape, or video laser
disc.

12. Penal Code section 311.11 states, in pertinent part:

(a) Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a felony and shall be punished by imprisonment in the state prison, or a county jail for up to one year, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both the fine and imprisonment.

COST RECOVERY

13. Code section 125.3 provides, in pertinent part, that a Board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

REGULATORY PROVISIONS

14. California Code of Regulations, Title 16, section 1444, states, in pertinent part:

A conviction or act shall be considered to be substantially related to the qualifications, functions or duties of a registered nurse if to a substantial degree it evidences the present or potential unfitness of a registered nurse to practice in a manner consistent with the public health, safety, or welfare. Such convictions or acts shall include but not be limited to the following:

...

(d) Any conviction or act subject to an order of registration pursuant to Section 290 of the Penal Code.

15. Regulation 1445, states in part pertinent:

...

(b) When considering the suspension or revocation of a license on the grounds that a registered nurse has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his/her eligibility for a license will consider the following criteria:

(1) Nature and severity of the act(s) or offense(s).

(2) Total criminal record.

1 (3) The time that has elapsed since commission of the act(s) or offense(s).

2 (4) Whether the licensee has complied with any terms of parole, probation,
3 restitution or any other sanctions lawfully imposed against the licensee.

4 (5) If applicable, evidence of expungement proceedings pursuant to
5 Section 1203.4 of the Penal Code.

6 (6) Evidence, if any, of rehabilitation submitted by the licensee.

7 **FIRST CAUSE FOR DISCIPLINE**

8 **(December 10, 2008 Criminal Conviction –**
9 **Possession of Child Pornography in November of 2007)**

10 14. Respondent is subject to disciplinary action pursuant to Code sections 490, 493,
11 2761(a) and (f), and California Code of Regulations, Title 16, section 1444 on the grounds that he
12 was convicted of crimes substantially related to the his qualifications, functions, and duties as a
13 registered nurse. The circumstances of the crimes are as follows:

14 15. On or about December 10, 2008 in the criminal proceeding entitled *People v. Frank*
15 *J. Deluca*, Superior Court San Diego County Case No. SCD213117, Respondent pled guilty to
16 Possession of Child Pornography as defined in Penal Code section 311.4(d) which was a violation
17 of Penal Code section 311.11(a), a felony.

18 16. On or about and between November 1, 2007 and November 20, 2007, Respondent
19 unlawfully and knowingly possessed and controlled matters depicting a person under the age of
20 18 personally engaging in and simulating sexual conduct as defined in Penal Code section
21 311.4(d) which was a violation of Penal Code section 311.11(a).

22 17. On or about February 19, 2009, Respondent was sentenced to 270 days in jail, three
23 years probation, fines, and restitution, and ordered to register as a sex offender pursuant to Penal
24 Code section 290.

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1 **PRAYER**


2 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
3 and that following the hearing, the Board of Registered Nursing issue a decision:

4 1. Revoking or suspending Registered Nurse License Number 588539 issued to Frank J.
5 Deluca.

6 2. Ordering Frank J. Deluca to pay the Board of Registered Nursing the reasonable costs
7 of the investigation and enforcement of this case, pursuant to Business and Professions Code
8 section 125.3;

9 3. Taking such other and further action as deemed necessary and proper.

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11 DATED: 6/5/09


12 RUTH ANN TERRY, M.P.H., R.N.
13 Executive Officer
14 Board of Registered Nursing
15 Department of Consumer Affairs
16 State of California
17 Complainant

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